Supreme Court of the United States

OCTOBER TERM, 1908

No. 325

L. J. BUTLER, as Marshal, etc.,

Petitioner,

vs.

LOUIS EBENHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of Gustave F. Mellen, John D. Rouse and William Grant, Counsel for L. J. Butler, etc., Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 297.

L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, *Petitioner.*

vs.

LOUIS BERNHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of Gustave F. Mertins, John D. Rouse and William Grant, Counsel for L. J. Bryan, etc., Petitioner.

STATEMENT.

The facts are briefly as follows: On October 29th, 1898, one D. Abraham, a wholesale crockery merchant, residing in the City of Montgomery, Alabama, and having a stock of goods and merchandise worth $10,000.00 and upwards, executed a deed of general assignment to one H. C. Davidson as Assignee, for the benefit of his creditors. The said instrument was delivered to the said Davidson who accepted said trust, and the same was on said day filed for record in the office of the Probate Judge of Montgomery County, Alabama.

Thereafter, on the 7th day of November, 1898, certain creditors of the said D. Abraham, in number and with debts to the amount required by law, filed an involuntary petition in bankruptcy against the said D. Abraham in the District Court of the United States for the Middle District of Alabama, sitting in Bankruptcy, al-

leging the execution and delivery of said deed of general assignment to be an Act of Bankruptcy under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, and asking that the said D. Abraham be adjudged a bankrupt and that his property be distributed according to law, and that such further proceedings be had thereon as the law in such cases provides.

Service was duly and forthwith had upon the said D. Abraham in the manner prescribed by law, and, upon the 12th day of December, 1898, the said D. Abraham was by said court adjudged a bankrupt within the purview of said act.

After the said involuntary petition was filed and service had, the said H. C. Davidson, as assignee, with actual knowledge of the proceedings then pending, transferred the stock of goods which had been assigned to him, at private sale to one Louis Bernheimer, who also had actual knowledge of said proceedings, the said Bernheimer claiming to buy the same and to pay therefor the sum of $3,500.00. Bernheimer entered into possession of said goods about the day the same was transferred to him, viz: on the 17th day of November, 1898, and immediately began to rapidly dispose of the same at what he called a "Bankrupt Sale."

On the 12th day of December, 1898, immediately after the adjudication, the petitioning creditors filed a petition in the District Court (see Record, p. 4), alleging the facts aforesaid and the interference of the said Bernheimer with the jurisdiction of said District Court, that he was dissipating said property, and praying that your petitioner L. J. Bryan, as Marshal, as provided for in said act, be required to take said property into his possession and to hold the same until the further orders

of said Court. An order was issued to your petitioner as prayed for by said creditors (see Record, p. 6), and your petitioner took charge of what remained of said property. On the following day a notice was issued by said District Court *ex mero motu* to the said Louis Bernheimer, to come into court within ten days and propound his claim, if any he had, to said goods. (Record, p. 7.)

On the 17th day of December, 1898, the petitioning creditors, A. C. Barler Manufacturing Co., *et al.*, filed another petition in said District Court, asking that the said Louis Bernheimer be required to account to said Court for the moneys received by him from the sale of goods while the stock was in his possession and while he was conducting his so-called "Bankrupt Sale" (Record, p. 7) and an order was issued by said District Court as prayed for.

On December 22nd, thereafter, the said Louis Bernheimer came into said District Court and filed a claim to said goods (Record, p. 14) and on December 24th, he filed his answer to the notice to account, (Record, p. 9), showing what he claimed had been his sales during the time the property was in his possession. He prayed that his claim and answer might be considered together, made of them a petition and submitted his rights to the court for adjudication, alleging that he had acquired a good title to the property.

The said A. C. Barler Manufacturing Co. et al., petitioning creditors, filed in said court eight demurrers to said claim and answer (Record, p. 11). The said District Court sustained said demurrers, and the said Bernheimer declining to plead further, the said District Court did, on the 24th day of December, 1898, enter up a judgment sustaining said demurrers and ordering a reference to determine the amount of sales made by the said Bernheimer (Record, p. 14).

Bernheimer thereafter executed a bond in the sum of $8,000.00 and prayed for an appeal and supersedeas to the Circuit Court of Appeals for the Fifth Circuit, which was granted (Record p. 15). Bernheimer filed said bond in said District Court and the same being approved, said property was by your petitioner released and returned to the said Bernheimer and has been disposed of by him.

On said appeal, the said Bernheimer assigned as error the sustaining of the demurrers and the redition of the judgment as the same was rendered (Record, p. 16). In said Circuit Court of Appeals, your petitioner, for the use of creditors, being made respondent, filed a motion to dismiss said appeal, alleging five separate grounds therefor (Record, p. 18).

In said Circuit Court of Appeals, said cause was docketed as follows: "*In re* D. Abraham, Bankrupt; Louis Bernheimer, Appellant, v. L. J. Bryan, Marshal, for the Use of Creditors, Appellee;" and was entered as "No. 797." Said cause was on the 9th day of February, 1899, argued and submitted upon the merits as well as upon the motion to dismiss in said Circuit Court of Appeals.

On April 25th, 1899, the Circuit Court of Appeals rendered an opinion and judgment in favor of said Bernheimer and against your petitioner as follows: "Did the District Court as a court of bankruptcy have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the District Courts as courts of bankruptcy, are not invested with jurisdiction to proceed in that way in cases such as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction." "Therefore, judging as we do, that their (the credi-

tors') application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he (Bernheimer) should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment whereof Bernheimer should be allowed a lien upon whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24th, 1898, be and the same is hereby reversed, and the cause is remanded to the District Court, sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the 17th day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require."

The opinion was rendered by McCormick and concurred in by Pardee, Circuit Judge. Judge Parlange filed a dissenting opinion to that part awarding costs, damages, counsel fees, expenses, etc., against the petitioning creditors.

A petition for a writ of certiorari to be directed to said Circuit Court of Appeals for the Fifth Circuit was filed by your petitioner in this honorable court and the same was granted and the writ was issued on to-wit: October 24th, 1899.

The petitioner makes the following Assignment of Errors:

1. The Court of Appeals erred in refusing to dismiss the appeal for the reasons assigned in the motion of the appellee (Record, p. 18).

2. Said Court erred in holding that the order of the District Court requiring the Marshal to seize the goods of the bankrupt, and that the seizure thereof, was unwarranted and unlawful.

3. Said Court erred in holding that the District Court, as a Court of Bankruptcy, was without jurisdiction to take possession of the property of the bankrupt, and adjudicate upon the title of the claimant thereto.

4. Said Court erred in holding that the District Court, as a Court of Bankruptcy, was without jurisdiction to adjudicate the claim interposed by Bernheimer, to the goods seized by the Marshal under its order.

5. Said court erred in reversing the judgment of the District Court, and in instructing said Court to dismiss the petition of the creditors, vacate all orders thereon and restore to said Bernheimer the goods taken from his possession.

6. Said court erred in holding that the claimant be allowed all costs, counsel fees, and damages occasioned by the seizure and detention of the goods in question, and in directing the amount thereof to be fixed by the District Court, and paid by petitioning creditors.

Argument.

Your petitioner is informed that in his brief to be presented to this Honorable Court, Bernheimer calls attention to endorsements on certain of the petitions and orders filed in the District Court, alleging in his brief that the orders were endorsed "filed" as of a few minutes before the petitions on these orders were endorsed "filed." **The orders refer to the petitions, which had been filed**

before and taken together, the error, if any, is corrected by the documents themselves. The Courts do not recognize parts of a day except in cases where different and adverse proceedings are filed against the same property. The documents themselves show by reference to each other that if such an endorsement was made, that the same was simply a clerical error and it could only be taken advantage of by some third party.

The Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, Chapter 3, Section 3, provides that "Acts of Bankruptcy by a person shall consist of his having (Subdivision 4) made a general assignment for the benefit of his creditors."

It has been decided by this honorable court that "a deed of assignment for the benefit of creditors is made by the Bankruptcy Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor."

West Company v. Lea, 174 U. S. Rep., 590.

The validity *vel non*, of the deed of assignment from Abraham to Davidson and the transfer from Davidson to Bernheimer, was, under the demurrers, the only question before the District Court. No question of jurisdiction was raised. Bernheimer's answer and claim, which he prayed might be taken and considered together, was in the nature of a petition and he made himself a party to the proceedings. The question of the jurisdiction of the District Court to try the title to the property, seems to have come into the case without being anywhere raised in the pleading and only after the case was in the hands of the Circuit Court of Appeals.

The cases of *In re*, Gutwillig, 92 Fed. Rep,, 337, and Davis v. Bohle *et al.*, 92 Fed. Rep., 325, and a long list of decisions of the District Courts all over the country, hold that a deed of assignment made within four months

before the filing of an involuntary petition in bankruptcy, is void as against the petitioning creditors.

The filing of an involuntary petition in bankruptcy, is a proceeding *in rem*, in which the *res* or estate is in *custodia legis*.

In re. Anderson, 23 Fed. Rep. 482.
Carter v. Hobbs, 92 Fed. Rep. 597.

The Bankruptcy Act of 1898 provides that the Courts of Bankruptcy "are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms." And subdivision 7, section 2 to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto except as herein otherwise provided." And under subdivision 15 to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." And under subdivision 6 to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy." And lastly—"nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

A review of the section necessarily compels the conclusion that except where expressly excepted, Congress intended to clothe the District Courts with the most ample powers to conduct and settle all matters in bankruptcy.

This section also provides, subdivision 3, that the courts of bankruptcy shall have original jurisdiction to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take

charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified."

This general provision is qualified by another provision folowing later, section 3, subdivision *c*, as follows: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt or any part of the same prior to the adjudication and pending a hearing upon the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of court, to be approved by the court or judge thereof in such sum as the court shall direct," etc.

The first and general provision allows the property to be taken into actual possession at any time after the filing of the petition, but the second provision qualifies it by providing that if this is done before the adjudication, there must be a bond.

Section 23 provides, subdivision *a* "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from bankruptcy proceedings, between trustees as such and adverse claimants concerning property acquired or claimed by the trustees, in the same manner and to the same extent only as though proceedings in bankruptcy had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Subdivision *b*.—"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By Section 67 *e*, it is provided that "all conveyances, transfers, assignments or incumbrances of his property or any part thereof, made or given by a person adjudged

a bankrupt under the provisions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against creditors of such debtor except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise, for the benefit of the creditors."

If the property had been in the actual possession of Abraham, there could be no question as to the right of the District Court to take possession of the same by petition and order as provided for in Sections 2 and 3 of the act. Bernheimer was not dignified with the name of "adverse claimant" except in the Court of Appeals.

Must the property necessarily be in the hands of the bankrupt? The act does not so provide. It simply says "the property of the bankrupt." The two cases above cited, viz: *In re.* Gutwillig and Davis v. Bohle *et al.*, hold that it may be taken away from the assignee of a bankrupt under these provisions when the bankrupt has made a general assignment.

In the case of Sharpe v. Doyle, 102 U. S. 686, cited also and approved in the case of Feibelman v. Packard, 109 U. S. 421, the defendant in error cited the cases of Smith v. Mason, 14 Wall. 419, and Marshall v. Knox, 16 Wall. 551. Bernheimer on his appeal cited the cases of Smith v. Mason and Marshall v. Knox and relied on them to show that the property could not be taken from him summarily.

The cases of Smith v. Mason and Marshall v. Knox differ materially from the case at bar in that in those cases the property had been transferred long before proceedings in bankruptcy were instituted, while here the property was in the hands of Davidson, Abraham's agent, when the proceedings were instituted. Both parties had actual knowledge of the proceedings pending and the transfer was nothing more or less than an attempt to get the property out of the reach of the District Court. Bernheimer's holding was simply a meddling and interfering with the jurisdiction of the District Court.

Mr. Justice Miller, in Sharpe v. Doyle, cited above, in delivering the opinion of the Court, said: "The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee (trustee), a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court of the assignee (trustee), to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceeding, he can, with the aid of *friends* or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee (trustee) or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that as soon

as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt, would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee (trustee) is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee (trustee) when appointed, as a sufficient reason for failing to take possession of it."

The petition and order in this case in the District Court was a proceeding for the vindication of the control of Abraham's property by the court. The notice to Bernheimer to come in and propound such claims as he might have to the goods and the action thereon seems to have been a proceeding to quiet the title to the property and to give Bernheimer an opportunity to be heard and it was fully authorized by Section 2 of the act.

In the case of Bank v. Shearman, 101 U. S. 403, Mr. Justice Swayne, for the Court, said: "The filing of the petition was a caveat to all the world. It was in effect an attachment and an injunction. Thereafter all of the property rights of the debtor were *ipso facto* in abey-

ance until the final adjudication. If that were in his favor, they revived and were in full force. If it were against him, they were extinguished as to him and vested in the assignee (trustee) for the purposes of the trust with which he was charged. The bankrupt became, as it were, *civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril.* They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps, they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee (trustee) is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise, the efficacy of the act depended not upon its own language, but was only what others outside of the proceeding might permit it to be. This would be a solecism and largely defeat the purposes of the statute and the policy of Congress in enacting it."

It would seem that the provisions of Section 2 of the Act and the interpretation of the present and former acts as expounded in the cases above cited, together with a reasonable construction of the terms and purposes of the whole bankruptcy legislation as applied to the case at bar, would be sufficient to meet every objection which could properly be raised to the proceedings and judgment of the District Court, by Bernheimer, the self styled "Intervenor."

Bernheimer contended in his brief, and the Circuit Court of Appeals upholds him in his contention, that the petitioning creditors should have waited until a trustee had been elected and then have asked the court to direct the trustee to go into the State Court and bring a

formal suit against him for the property because of Section 23 of the Act, which is cited above. The court holds that the District Court had no jurisdiction whatever to try Bernheimer's title to the property. It goes on to say (Record, p. 34) "the adverse claimant is entitled to his day in court and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him."

The court goes on to say further (see Record, p. 33), "It is therefore apparent that, as a general rule, all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such (or other duly appointed and empowered representatives of the bankrupt's estate) and adverse claimants concerning the property acquired or claimed by the trustees (or other duly appointed and empowered representatives of the bankrupt's estate), which cannot be and are not adjusted by negotiation, arbitration or compromise, *must be abandoned by the trustees or adjudicated in the State Courts, unless by consent of the proposed defendant suit can be brought in a United States Court.*"

We respectfully contend that the proceedings against Bernheimer was not a suit against an adverse claimant, and especially that it was not an original suit. It was merely auxiliary to the main proceeding and was a graft upon it or rather it might be called an off shoot.

The property was taken from Bernheimer because his taking and holding of it was a fraud upon the act and an interference with the jurisdiction. The notice was issued to enable the court to determine whether its authority had been misapplied, as Bernheimer claimed,

and to determine the truth or justice of such claim. It was the purpose of the court to determine, speedily and inexpensively what Bernheimer might have to say.

Bernheimer then came in, styling himself "Intervenor" and filed what Mr. Justice Story calls in Clarke v. Mathewson, 12 Pet., 164-172, a dependent bill.

"When any person," says Mr. Daniell (Ch. Pr. Ch. 26, Sec. 7, p. 1057), "claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property requestered. This inquiry is called an examination *pro interesse suo;* and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate."

It has been said that the grounds of this proceedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court.

It seems to us that this is just what Bernheimer did in the case at bar.

After a careful examination of Section 23 *b* of the Act, it seems clear to us that the suits referred to in that section and which the trustee must bring in the State Courts are such as are based on causes of action vested in the bankrupt prior to bankruptcy proceedings and which were transmitted to the estate by the assignment. As to these, it may be conceded that the trustee must, under the Act, resort to the court which would have had jurisdiction of the action if brought by the bankrupt.

The action, however, to recover assets unlawfully concealed or assigned, is not derived from the bankrupt, but is vested in the creditors through their trustee, by statute, and jurisdiction to enforce it is necessarily invested in the Court which is charged with the administration of the estate. Where rights of action existed in favor of the bankrupt, the trustee becomes a new party, but in the same forum and there would be no especial reason for bringing such actions in the District Court. Congress has followed out the opinions of this honorable court which have suggested that it might bring about hardship if outside parties against whom the bankrupt held a right of action, are to be brought into the District Court to defend such suits when they may reside at some distance from the place of holding these courts and may be entirely innocent of any wrong-doing.

The causes of action, however, which arise through the administration of a bankrupt's estate in a Federal Court, are simply off shoots from the main proceedings and it cannot be that Congress meant to take all jurisdiction to try such causes from the District Courts by Section 23 *b*, and to confer the jurisdiction upon State Courts.

Congress has not the power, if it had the will, to confer jurisdiction on any State Court.

Dudley v. Mayhew, 3 N. Y. 9.
Valarino v. Thompson, 7 N. Y. 576.
Martin v. Hunter, 1 Wheat. 334.

Under the Act, as we interpret it, Congress has not attempted in any way to force the administration of the Act upon the State Courts. It has simply said that the Federal courts shall not, although they may have jurisdiction of the subject matter, proceed to adjudicate causes of action which existed in favor of the bankrupt before proceedings in bankruptcy were instituted, except by consent of the proposed defendant. Had this

been such a cause of action, the State Court would under the act have exclusive jurisdiction.

This cause of action is one which was created entirely by Congress and, although the State Courts might have concurrent jurisdiction with the Federal Court and might take cognizance of causes of action born through Federal legislation, yet Congress cannot compel them to do so, as they are not in any sense inferior Courts under the constitution and are not ordained by Congress.

Stearns v. U. S., 2 Paine 211.

If State Courts are left to adjudicate causes of action which existed prior to bankruptcy proceedings, then the same rules of evidence will obtain, although the trustee may have become a party under the act and no one can complain.

If, however, the State Courts are to have exclusive jurisdiction, not only of causes of action which existed prior to bankruptcy proceedings, but also of causes arising purely through the administration of the Act, then can it be said that the bankruptcy system will be uniformly administered?

Congress cannot prescribe rules of evidence for the State Court.

People v. Gates, 43 N. Y. 40.
Caldwell v. Steamboat Co., 47 N. Y. 282.
Carpenter v. Snelling, 97 Mass. 452.

Would it be reasonable to suppose that Congress would have delegated such broad authority to the District Courts in such plain language in Section 2 of the Act, if it had intended by Section 23 *b* to leave to them but little besides the adjudication, distribution and discharge?

Congress has the right to pass uniform bankruptcy laws, but the State Courts are not obliged to assist in administering them.

"States in providing their own judicial tribunals, have a right to limit, control and restrict their judicial functions and jurisdiction according to their mere pleasure."

Per. Clifford, J., in Shearman v. Bingham, 7 Bk. Reg. 500.

It is to be supposed that Bernheimer would have preferred that the District Court should have waited until a trustee had been elected and then have the trustee bring a formal suit against him in the State Court, which might not come to trial for months afterwards, when he could mock the efforts of the trustee to prove the articles composing and the value of a stock of goods which had been scattered to the four winds, and which the trustee had never seen. Why not execute a bond and attach in the State Court so that there would be no delay? Who would execute such a bond and who would become surety for a trust estate, when that estate was being juggled about, scattered and hidden away? Surely Section 23 *b* cannot mean that the consent of a wrongdoer such as Bernheimer must be obtained before the District Court can by its own orders protect its jurisdiction. The very act itself, section 29, sub. *b.*, No. 4, makes it a crime for any person to receive "any material amount of property from a bankrupt after the filing of the petition, with the intent to defeat this act." Davidson, the assignee, was simply Abraham's agent. He had no more title to the property than Abraham had. The assignment was void.

The above is our interpretation of Section 23 *b*, and if the Act is enforced according to this interpretation, no one can be heard to complain reasonably. No one is

brought into the District Court either through petition and order or plenary bill unless he has in some way busied himself with the bankrupt's affairs or attempted to loot the estate. As to other parties against whom the bankrupt had rights of action before the proceedings, these rights would be adjudicated in the same forum in which suit would have been brought had proceedings in bankruptcy not been instituted. The court would have jurisdiction over the cause of action, but not over the person, except by consent. The interpretation would seem to be reasonable, just and fair.

There have been a great many interpretations of Section 23 and the various District Courts and some of the Circuit Courts differ widely as to its meaning when taken in connection with other parts of the bankrupt law. There is no other part of the Act of 1898 for which there is a more crying need of interpretation by this Honorable Court. While it is our opinion that the question of jurisdiction has been injected into this case improperly, yet the fact that it is now in it will make the necessity for deciding the question just as urgent.

The great preponderance of decisions is in favor of the interpretation which allows the District Court to proceed with the collection of the assets of a bankrupt estate as provided for in the act, except where the right of action existed in favor of the bankrupt before proceedings in bankruptcy were instituted. In some jurisdictions, all actions must be brought in the State Courts unless the bankrupt or his friends voluntarily deliver the property to the trustee. The words of Mr. Justice Miller in Sharpe v. Doyle, above cited, come home to us with particular force when we see the effect of the latter interpretation upon the case at bar. The District Courts should have full power to administer the estate without donating their rights of action to the State Courts, where

they would at best be but poorly and slowly adjudicated. They should by all means be allowed to exercise the authority given them under the Act to protect their jurisdictions and the estates which come into their care from those who seek to speculate upon them.

They should not be made the spawning beds for innumerable suits which will arise through inability to protect their jurisdiction and which must afterwards be nurtured and tended through a long and precarious existence in the State Courts. The declared purpose of the Act is to administer estates cheaply, rapidly, honestly and uniformly and it cannot be done while the present conflict in decisions exists and while parties are allowed to loot an estate over which a District Court has obtained jurisdiction and then choose the forum and the proceedure which may best suit their purposes for a trial in the matter.

We cite below several cases on the question of jurisdiction and we would especially invite the attention of this Honorable Court to the able and exhaustive opinion of Judge Lowell in the case of *In re.* Hammond, and to that of Referee Olmstead in "In the matter of Andrew J. Murphey," in which the history of bankruptcy legislation is taken up and thoroughly discussed.

In re. Sievers, 91 Fed. Rep. 366.
In re. Brooks, 91 Fed Rep. 508.
In re. Gutwillig, 92 Fed. Rep. 337.
Davis v. Bohle, 92 Fed. Rep. 325.
Carter v. Hobbs, 92 Fed. Rep. 595.
In re. Richard, 94 Fed. Rep. 635.
Carriage Co. v. Stengel, 95 Fed. Rep. 637.
Murray v. Beal, 97 Fed. Rep. 569.
In re. Newberry, 97 Fed. Rep. 24.
In re. Woodbury, 98 Fed. Rep. 833.

In re. Andrew J. Murphy, National Bk. N. & R., Vol. 2, No. 8, 393.
Norcross v. Nathan, 99 Fed. 414.
Cox v. Wall, 99 Fed. 546.
In re. Hammond, 98 Fed. Rep. 845.

The Circuit Court of Appeals in this case says that the District Court had no jurisdiction whatever to try and determine Bernheimer's title to the property. We contend that under Section 2 of the Act, it had full power to do so and that original jurisdiction was given it. It then orders the District Court to fix and allow to Bernheimer "all costs, counsel fees, costs and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him (Bernheimer), they to be "paid by the petitioning creditors."

How can the District Court proceed to fix and allow such damages for the taking and detention of the property until it first determines whether Bernheimer had a good title to the property? If he had no right to the property, then he was not damaged by the taking and detention and the petitioning creditors would have a right to require Bernheimer to prove in the District Court first of all things, that the property belongs to him. He must lay his predicate for the proof. The Circuit Court of Appeals says that the District Court has no jurisdiction to do this and yet it proceeds to direct it to do so.

The right of the petitioning creditors to require this proof has been fully decided by this court in the cases of Sharpe v. Doyle and Feibelman v. Packard, above cited. Besides this, there is not in the Bankruptcy Act anywhere any authority for the allowance of damages such as are attempted to be awarded in this case.

This Honorable Court has said that a court which has no jurisdiction of a case, cannot even award costs or order execution for them to issue.

Judge Parlange, in his opinion dissenting from that portion of the decision of the Circuit Court of Appeals which awards, these costs, damages, counsel fees, expenses, etc., cited the following cases:

Mayor v. Cooper, 6 Wall. 247.
Smith v. Whitney, 116 U. S. 175.
Elk v. Wilkin, 112 U. S. 98.

We earnestly and respectfully contend that the action of the District Court, sitting in bankruptcy, was in all things proper, and respectfully pray that the judgment of the Circuit Court of Appeals in this case, and every part thereof, may be reversed by this Honorable Court.

Respectfully submitted,

GUSTAVE F. MERTINS,
JOHN D. ROUSE,
WILLIAM GRANT,
Counsel for Petitioner.